83-1048

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BERNARDO ARMANDO DE LA CERRA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

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QUESTIONS PRESENTED

1. Whether Federal Rules of Evidence, Rule 104(a), has modified prior law to the contrary and authorized the consideration of challenged hearsay statements in deciding the preliminary question of the admissibility of those statements under the co-conspirator exception to the hearsay rule?

2. Whether a defendant's membership in a conspiracy must be shown by a preponderance of the evidence or by mere prima facie evidence, before hearsay statements are admitted under the co-conspirator exception to the hearsay rule?

3. Whether the hearsay statements admitted against the Petitioner at his criminal trial were properly admitted under the co-conspirator exception to the hearsay

rule, and if they were not properly admitted, is the remaining evidence sufficient to convict the Petitioner of conspiracy and possession of narcotics?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No.

BERNARDO ARMANDO DE LA CERRA, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner, Bernardo Armando De La Cerra, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on August 19, 1983. A petition for rehearing was denied by the Court of Appeals on October 27, 1983.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is attached as Appendix "A" hereto. The order denying the petition for rehearing is attached as Appendix "B".

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 19, 1983. The order denying a rehearing was entered on October 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and (2).

STATUTES INVOLVED

Federal Rules of Evidence, Rule 104(a) provides:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the

existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Federal Rules of Evidence, Rule 801(d)(2)(E) provides:

> (d) Statements which are not hearsay. A statement is not hearsay if --
>
> * * *
>
> (2) Admission by party-opponent. The statement is offered against a party and is...
>
> (E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

The Petitioner, Bernardo Armando De La Cerra, was convicted after a jury trial in the United States District Court in Arizona of two felony offenses. Count I

alleged conspiracy to distribute cocaine in violation of 21 U.S.C., sections 846 and 841(a)(1). Count II alleged the crime of possession with intent to distribute cocaine in violation of 21 U.S.C., section 841(a)(1). The Petitioner was sentenced to six years in custody concurrently on each count. In his appeal to the United States Court of Appeals for the Ninth Circuit, the judgment of conviction was affirmed.

STATEMENT OF THE FACTS

The evidence established that Oscar Montenegro and Hector Espinoza were involved selling cocaine. Numerous meetings, discussions and telephone call conversations occurred between those two men and undercover Drug Enforcement Administration Agent Victor Cortez. While negotiating the sale of the cocaine, Oscar Montenegro disclaimed any ownership of the cocaine,

stating that he was only a middleman and that the cocaine would be flown in to Tucson from Los Angeles.

Hector Espinoza made arrangements with Alfredo Lucero in order to use Lucero's residence at 4195 South Mountain in Tucson as a place where the cocaine sale to Agent Cortez could occur. On June 23, 1982, Oscar Montenegro called Agent Cortez and arranged for Agent Cortez to meet him at the Mountain Street residence. The record also establishes that June 23, 1982 was also the day that the Petitioner flew from Los Angeles to Tucson.

When Agent Cortez arrived at the Mountain Street residence, he entered the residence and went to a back bedroom where he was shown the cocaine by Oscar Montenegro and Hector Espinoza. On his way to the back bedroom, Agent Cortez noticed that Francisco Soto was in another bedroom and

that the Petitioner was in a third bedroom. Other evidence in the case established that the Petitioner had arrived shortly before Agent Cortez and that the Petitioner was carrying a suitcase when he entered the residence.

While Agent Cortez was in the bedroom with Oscar Montenegro and Hector Espinoza, Agent Cortez asked Montenegro concerning the precise weight and the quality of the cocaine. Before answering each question, Oscar Montenegro left the bedroom where the cocaine and Agent Cortez remained. On each occasion, after a short period of time, Oscar Montenegro would return and provide the answers to Agent Cortez' questions. On one occasion, Montenegro stated that the owner of the cocaine said that it was of good quality.

The government offered no evidence establishing who Oscar Montenegro spoke

with, or, indeed, if he spoke with anyone, when he left the bedroom containing the cocaine and Agent Cortez. After all of his questions were answered, Agent Cortez left the residence, gave the arrest signal, and agents entered the residence and arrested all of the occupants. Oscar Montenegro and Hector Espinoza were arrested as they attempted to run from the residence. On the other hand, however, Francisco Soto and the Petitioner were arrested in their separate bedrooms without any attempt on their part to run from the agents. Neither resisted arrest.

Furthermore, no cocaine was found on the person of the Petitioner or in the bedroom where he was arrested. The government offered no statement made by the Petitioner in its case-in-chief. Apparently through an oversight, the DEA agents left the Petitioner's suitcase at

the Mountain Street residence after arresting the Petitioner. Several days later, the agents returned for the suitcase. The suitcase was examined by a narcotics-sniffing dog to determine whether or not cocaine had been in the suitcase on any occasion. The examination by the narcotics-sniffing dog proved negative for the presence of cocaine in the suitcase.

REASON FOR GRANTING THIS PETITION

I

THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUITS CONCERNING WHETHER A COURT SHOULD CONSIDER THE CHALLENGED HEARSAY STATEMENTS IN DECIDING THE PRELIMINARY QUESTION OF THE ADMISSIBILITY OF THOSE STATEMENTS UNDER THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE

The issue of whether a trial court may consider the challenged hearsay statements in deciding the preliminary question of the admissibility of those statements under the co-conspirator exception to the hearsay rule was before this Court as recently as October 30, 1983. On that date in Arnott v. United States, 82-2028, 52 U.S. Law Week 3340, this Court denied certiorari on this issue. However, Justice White dissented, noting that the question presented was one of substantial importance and that the circuits are divided on this question.

In Justice White's dissent in the Arnott case, it was noted that the Sixth Circuit under United States v. Vinson, 606 F. 2d 149, 153 (6th Cir. 1979) has abandoned the pre-existing rule that co-conspirator statements are admissible only after the government establishes independent proof of the conspiracy. In noting this major departure from pre-existing case law, Justice White stated:

> Without commenting on the sufficiency of the Government's independent evidence, the Court of Appeals simply reaffirmed its previous holdings that Fed.Rule Evid. 104(a) had modified prior law to the contrary so as to authorize the consideration of challenged hearsay statements in deciding the preliminary question of admissibility, see, e.g., United States v. Cassity, 631 F.2d 461, 464 (1980); United States v. Vinson, supra, at 153, and rejected petitioner's contention. 704 F.2d 322, 325.
>
> The rule adopted by the Sixth Circuit and applied in this case conflicts with the one enun-

ciated by every other Court of Appeals that has addressed the issue. Those courts have, almost without exception, admitted statements of co-conspirators only upon a showing by a preponderance of independent evidence that a conspiracy existed in which the declarant and the defendant were both members and that the challenged statements were made in furtherance of the conspiracy. See, United States v. Nardi, 633 F. 2d 972, 974 (CA1 1980); United States v. Alvarez-Porras, 643 F. 2d 54, 56-57 (CA2), cert. denied, 454 U.S. 839 (1981); Government of the Virgin Islands v. Dowling, 633 F.2d 660, 664 (CA3), cert. denied, 449 U.S. 960 (1980); United States v. Gresko, 632 F.2d 1128, 1131-1132 (CA4 1980); United States v. James, 590 F.2d 575, 580-581 (CA5) (en banc), cert denied, 442 U.S. 917 (1979); United States v. Regilio, 669 F.2d 1169, 1174 (CA7 1981), cert. denied, 457 U.S. 1133 (1982); United States v. Bell, 573 F. 2d 1040, 1043-1044 (CA8 1978); United States v. Andrews, 585 F.2d 961, 964-967 (CA10 1978); United States v. Monaco, 702 F. 2d 860, 876-880 (CA11 1983) (stating standard in terms of both substantial evidence and preponderance of the evidence); United States v. Jackson, 201

U.S. App. D.C. 212, 227-234, 627 F.2d 1198, 1213-1220 (CADC 1980). The Ninth Circuit requires independent evidence sufficient to establish a prima facie case that a conspiracy existed and that the defendant was part of it. See, United States v. Miranda-Uriarte, 649 F.2d 1345, 1349-1350 (1981). See also, United States v. Nixon, 418 U.S. 683, 701, and n.14 (1974)(dicta) (52 U.S. Law Week 3340)

The identical issue exists in the Petitioner's case because from the Ninth Circuit's opinion it is clear that in determining whether there was independent evidence of the conspiracy, the Court considered part of the hearsay statements themselves. The Ninth Circuit opinion in this case states:

> Under the standard set forth above, there is sufficient evidence in the record to connect De La Cerra to the conspiracy. De La Cerra entered the house in which the sale was to take place carrying a suitcase. Since he was the only one of four people to enter carrying anything, the jury could have concluded that he brought the

> cocaine into the house. In addition, De La Cerra had arrived in Tucson less than an hour before Montenegro called a government agent to say "Everything is here." This evidence constitutes the "slight evidence" required for connection to an established conspiracy. (Slip opinion, p.3-4)

In determining whether the Petitioner was a member of the conspiracy, which was a foundational fact for the admission of statements of alleged co-conspirators against him, the Court used evidence of the statement of alleged co-conspirator Montenegro in determining whether or not there was evidence connecting the Petitioner to the conspiracy. This clearly violates existing law which requires that "In order to prove the existence of conspiracy under the third prong of the co-conspirator exception, the prosecution must establish a prima facie case through the introduction of substantial independent evidence other

than the contested conspiracy." United States v. Perez, 658 F. 2d 654, 658 (9th Cir. 1981). Stated another way, hearsay declarations of co-conspirators are admissible only if there is proof independent of the declarations themselves that the defendant is connected with the conspiracy. See, Carbo v. United States, 314 F. 2d 718-735 (9th Cir. 1963).

Even in the earlier opinions of this Court on the hearsay rule, independent proof of the conspiracy is required prior to admitting co-conspirator statements. In United States v. Nixon, 418 U.S. 683, 701 (1974), this Court stated:

> The hearsay rule does not automatically bar all out-of-court statements by a defendant in a criminal case. Declarations made by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant

> if the declarations at issue were in furtherance of the conspiracy. (Id., at 701)

Earlier, in Glasser v. United States, 315 U.S. 60, 74-75 (1974), this Court also stated:

> [D]eclarations [of co-conspirators] are admissible... only if there is proof aliunde that he [the defendant] is connected with the conspiracy. Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence. (Id., at 74-75)

Nothing in Rule 104(a) of the Federal Rules of Evidence appears to expressly or directly modify existing laws pertaining to conspiracy and the co-conspirator hearsay exception. Petitioner, therefore, urges that this petition be granted to resolve this conflict of authority.

II

THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUITS CONCERNING WHETHER A DEFENDANT'S MEMBERSHIP IN A CONSPIRACY MUST BE SHOWN BY A PREPONDERANCE OF THE EVIDENCE OR BY MERE PRIMA FACIE EVIDENCE, BEFORE HEARSAY STATEMENTS ARE ADMITTED UNDER THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE

The Federal Rules of Evidence, Rule 801(d)(2)(E) provides in part that: "[A] statement is not hearsay if...[t]he statement is offered against a party and is... a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

The Federal Rules of Evidence carry forward the common law policy against the admission of hearsay testimony. See generally, 4 J. Weinstein and M. Burger, Weinstein's Evidence, §800(02) (1981). Thus, a witness cannot testify in court concerning someone else's out-of-court

statement to establish the truth of facts asserted in that statement.

A major exception to this policy is that the out-of-court statements of a party to the case or his agent are considered "admissions" and may be used as substantive evidence. Federal Rules of Evidence, Rule 801(d)(2). One aspect of this admissions exception to the hearsay rule is the co-conspirator exception to the hearsay rule which is set forth above in Rule 801(d)(2)(E).

The co-conspirator exception to the hearsay rule provides that statements offered against a party that are made "by a co-conspirator of a party during the course and in furtherance of the conspiracy" are not hearsay and are admissible. "Essentially, this provision treats a conspiracy as a type of agency relationship and holds a party vicariously responsible for the

statements of his co-conspirators." United States v. Gibbs, 703 F. 2d 683, 687 (3rd Cir. 1983).

The co-conspirator exception to the hearsay rule requires proof of three elements: (1) that the declaration be in furtherance of the conspiracy; (2) that the declaration be made during the course of the conspiracy; and (3) that there is independent proof of the existence of the conspiracy and the connection of the declarant and the defendant with it. United States v. Perez, 658 F. 2d 654, 658 (9th Cir. 1981); Carbo v. United States, 314 F. 2d 718, 753 (9th Cir. 1963); United States v. Eubanks, 591 F. 2d 513 (9th Cir. 1979). The determination of whether or not a hearsay declaration is admissible under the co-conspirator exception, is resolved by the trial judge, and not the jury. United States v. King, 552 F.2d 833,

848 (9th Cir. 1976).

The co-conspirator's exception to the hearsay rule applies, as stated in this Court's decision in Anderson v. United States, 417 U.S. 211, 218 (1974), "if the declaration was made during the course and in furtherance of the conspiracy charged..." As a practical matter, however, the admissibility of the hearsay evidence does not rest upon the fulfillment of the conditions enunciated in the Anderson case. More frequently, the admissibility of hearsay statements under the co-conspirator exception turns upon a determination of a third criteria, namely, whether there is sufficient evidence exclusive of the hearsay to connect the defendant with the conspiracy. As one Court stated "[S]uch declarations are admissible...only if there is proof independent of the declaration that he [the defendant] is connected with the

conspiracy." Carbo v. United States, 314 F. 2d 718, 735 (9th Cir. 1963).

Unfortunately, the federal courts have not formulated a uniform test to determine the quantum of independent evidence necessary to satisfy the third pre-condition to the admission of a co-conspirator's declaration. All of the federal court of appeals have instructed trial judges in the district courts that they must ignore the hearsay itself, and concentrate solely on the so-called independent evidence in the case before determining whether there is sufficient foundation to admit the hearsay. See, Lutwak v. United States, 344 U.S. 604, 617 (1953). The reason for this is that co-conspirator statements are admitted on the basis of an agency theory. And the existence of an agency cannot be shown by the agent's own declaration; the fact of the agency must be shown indepen-

dently. United States v. Renda, 56 F. 2d 601, 602 (2nd Cir. 1932)

The United States Supreme Court has offered no definitive guidance in this area, and has not adopted a standard for the trial judges to use in determining whether or not the independent evidence is sufficient to connect the defendant to the conspiracy. In United States v. Nixon, 418 U.S. 683, 701 (1974), the Court stated:

> Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of the conspiracy. (Id., at 701)

In a footnote to that statement, the Court elaborated on its expression "independent evidence" and suggested that "as a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take

the question to the jury." Id., at 701 n.14. Clearly, if the Court meant to equate substantial evidence with a reasonable doubt standard, it could have done so explicitly. But on the other hand, if substantial evidence means something less than reasonable doubt, it is difficult to understand why the Court would not be more specific concerning what that standard should be.

Because of the lack of specificity, the circuits are split concerning the standard to be used by the trial court. In the Ninth Circuit and the Eighth Circuit, the trial judge merely must find that the prosecution has established by prima facie evidence that a conspiracy exists and that the defendant is a member of the conspiracy in order to allow the hearsay statements of a co-conspirator to be admitted. United States v. Perez, 658 F. 2d 654, 658 (9th

Cir. 1971); United States v. Spanos, 462 F. 2d 1012, 1014 (9th Cir. 1972); United States v. Morton, 483 F. 2d 573, 576 (8th Cir. 1973).

On the other hand, in contrast to this, the vast majority of federal courts of appeals have held that "The prosecution must lay a foundation for the admission of co-conspirator hearsay by establishing the existence of a conspiracy including the defendant by a fair preponderance of independent evidence." United States v. Gibbs, 703 F. 2d 683, 687 (3rd Cir. 1983); United States v. James, 590 F. 2d 575 (5th Cir. 1979); United States v. Andrews, 585 F. 2d 961 (10th Cir. 1978); United States v. Santiago, 582 F. 2d 1128 (7th Cir. 1978); United States v. Enright, 579 F. 2d 980 (6th Cir. 1978); United States v. Petrozziello, 548 F. 2d 20 (1st Cir. 1977); United States v. Jones, 542 F. 2d 186 (4th

Cir. 1976). The preponderance of evidence standard requires that the prosecution present sufficient proof leading the trial judge to find that the existence of the contested fact is more probable than its non-existence. United States v. Trotter, 529 F. 2d 806, 812 n.8 (3rd Cir. 1976). See also, McCormick, Evidence 794 (2nd Ed. 1972). In the Trotter case, the Third Circuit refused to accept the government's suggestion that a less rigorous standard requiring only prima facie proof was appropriate in light of United States v. Nixon, 418 U.S. 683 (1974).

Conspiracy prosecutions in federal courts undoubtedly account for more than half of the criminal prosecutions that are brought. The rules governing the admissibility of co-conspirator hearsay should, therefore, be brought into uniformity by a decision of the United States Supreme Court.

III

HEARSAY STATEMENTS ADMITTED AGAINST THE PETITIONER AT HIS CRIMINAL TRIAL WERE NOT PROPERLY ADMITTED UNDER THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE AND THE REMAINING EVIDENCE IS INSUFFICIENT TO CONVICT THE PETITIONER OF CONSPIRACY AND POSSESSION OF NARCOTICS

In the present case, the only evidence connecting the Petitioner to the conspiracy, which is completely independent of the statements of the co-defendants, is the fact that the Petitioner carried a suitcase into the house and that he was the only one of four people to enter the house carrying anything. From this, the Ninth Circuit has concluded that the jury could have concluded that he brought the cocaine into the house. The Petitioner submits that this is not the substantial independent evidence of the Petitioner's membership in the conspiracy required before such hearsay is admissible. In a footnote in United States v. Nixon,

supra, at 704 n.14, the Court elaborated on its expression "independent evidence" and suggested that "as a preliminary matter, there must be substantial, independent evidence of the conspiracy, at least enough to take the question to the jury." There was never any proof at the trial that cocaine was ever inside Petitioner's suitcase. Indeed, the Drug Enforcement Administration attempted to prove that cocaine was in the suitcase through the use of specially trained dogs. However, the dogs failed to alert on the suitcase and proved precisely the opposite of what the prosecution was contending -- namely, that no cocaine had been in the suitcase. On this record, therefore, for the jury to conclude that Petitioner brought the cocaine into the house merely because he was carrying a suitcase, is a conclusion that borders on speculation.

Essentially, the Petitioner is arguing that the mere carrying of a suitcase into a house is insufficient evidence to establish that he was a member of the conspiracy. And if this evidence did not establish that he was a member of the conspiracy, then the hearsay statements of the co-defendants, especially Mr. Montenegro, should never have been admitted during his case during the course of the trial.[1/] Furthermore, the

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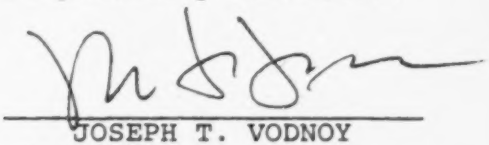
1/The trial court admitted the highly prejudicial and inadmissible evidence concerning the co-conspirator declaration of Montenegro. For example, a government agent testified that Montenegro stated that co-defendant Soto had a pal in Los Angeles who had one kilogram of cocaine to sell. The government agent also testified that Montenegro called himself a middleman and that Montenegro stated that he had an associate flying to Tucson from Los Angeles who had the cocaine. Likewise, the government agent testified that Montenegro stated that the connection was arriving around 5:00 p.m. and after 5:00 p.m., Montenegro told the agent that everything was ready for the transaction. Finally, during the transaction itself, Montenegro told the agents that (con't)

evidence would be legally insufficient to sustain his conviction on appeal and this Court should reverse that conviction for insufficient evidence.

CONCLUSION

Based upon the foregoing, Petitioner urges that this petition be granted.

Respectfully submitted,



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[footnote 1/ continued]
the source of the cocaine was in the house. Since all of these statements of Montenegro came as hearsay statements, testified to by a government agent, their admissibility depended upon a proper foundation being laid under the co-conspirator exception to the hearsay rule.

APPENDIX "A"

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-1643 and 82-1644
USDC NOS. CR 82-139-3-ACM,
CR 82-139-4-ACM

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

FRANCISCO ARMANDO SOTO,

Defendant/Appellant.

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

BERNARDO ARMANDO DE LA CERRA,

Defendant/Appellant.

Appeal from the United States District Court
for the District of Arizona
Hon. Alfredo C. Marquez, Judge Presiding
Argued and Submitted June 14, 1983

MEMORANDUM

[Filed Aug. 19, 1983]

Before: WALLACE, TANG, and NELSON, Circuit Judges

Appellants Soto and De La Cerra appeal their convictions for conspiracy to distribute cocaine, a violation of 21 U.S.C. §§ 841(a)(1), 846, and possession with intent to distribute cocaine, a violation of 21 U.S.C. §841(a)(1). Soto challenges the trial court's denial of a motion to sever and the denial of motions for dismissal and for a judgment of acquittal based on the sufficiency of the evidence. De La Cerra claims 1) that there was not sufficient evidence for his conviction, 2) that the trial court erred in admitting his post-arrest statements, and 3) that he was not allowed full cross-examination. We find these contentions without merit.

We review the decision on severance for abuse of discretion. United States

v. Abashi, 682 F. 2d 1289, 1296 (9th Cir. 1982). Soto argues that, under Bruton v. United States, 391 U.S. 123 (1968), the trial judge should have severed his trial because De La Cerra's post-arrest statement that Montenegro checked with Soto on the quality of the cocaine was admitted into evidence. We find no merit in this argument. De La Cerra took the stand and Soto had full opportunity to cross-examine him, making Bruton inapplicable. See id. at 126.

Soto alternatively argues that he should have been granted a severance because had there been separate trials, co-defendants would have testified on Soto's behalf. Soto made no showing, however, that any of his co-defendants would testify for him, though the trial court gave him the opportunity to make such a showing at any time. The unsupported assertion that a codefendant would testify formally in

a separate trial does not require reversal of the denial of a motion for severance. E.g., United States v. Hadnett, 638 F. 2d 1179, 1187 (9th Cir. 1980).

The standard of review for the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 314 (1979). Soto argues that the evidence proves only his presence at the scene of the crime, which is insufficient to connect him with the conspiracy. See United States v. Weaver, 594 F. 2d 1272 (9th Cir. 1979). Once a conspiracy is established, only slight evidence is necessary to convict a co-conspirator. E.g., United States v. Ledesma, 499 F.2d 36, 40 (9th Cir. 1974). In this case, there was substantial

evidence to connect Soto to the conspiracy in addition to his presence: a principal in the conspiracy had introduced Soto to a government informant as a cocaine seller; Soto arrived at the house in Tucson on the same night that other conspirators showed cocaine and scales to a government agent; and a federal officer testified that Soto did not respond to a knock at the door and the announcement of "federal offices." This evidence was sufficient to establish Soto's connection to the conspiracy. See, e.g., United States v. Brandon, 633 F. 2d 773, 780-81 (9th Cir. 1980); United States v. De Jesus, 520 F.2d 298, 299 (1st Cir.) cert.denied, 423 U.S. 865 (1975).

Under the standard set forth above, there is sufficient evidence in the record to connect De La Cerra to the conspiracy. De La Cerra entered the house in which a sale was to take place carrying a suitcase.

Since he was the only one of four people to enter carrying anything, the jury could have concluded that he brought the cocaine into the house. In addition, De La Cerra had arrived in Tucson less than an hour before Montenegro called a government agent to say "everything is here." This evidence constitutes the "slight evidence" required for connection to an established conspiracy.

De La Cerra claims that the district court committed clear error in denying his motion to suppress post-arrest statements on grounds that he was not properly informed of his Miranda rights. United States v. Booth, 669 F. 2d 1231, 1238 (clearly erroneous standard of review applies). We find no merit in this contention. The record indicates that De La Cerra was adequately informed of his Miranda rights at the time of his arrest, and waived those rights before making his statements. See

California v. Prysock, 453 U.S. 355, 359 (1981); United States v. Sanford, 673 F. 2d 1070, 1072 (9th Cir. 1982).

De La Cerra also argues that he was denied the right to confront witnesses when the court cut off cross-examination of government witnesses on two occasions. On the first occasion, the court ended the examination of a government agent regarding the government's failure to charge the tenants of the house where the arrests took place. The court later allowed a careful cross-examination of the tenants themselves. We find that the credibility of the tenants was of such "slight or marginal relevance" that the court was not required to permit further cross-examination of the government witness. See Chapman v. Mercer, 628 F.2d 528, 530 (9th Cir. 1980). On the second occasion, De La Cerra was stopped in examining one of the tenants as to the time

the cocaine and scales were brought in. De La Cerra was later allowed to examine this tenant fully on that question, so that his cross-examination was not effectively restricted. See United States v. Cutler, 676 F. 2d 1245, 1249 (9th Cir. 1982) (test is whether the jury had sufficient information on the issue).

Accordingly, the convictions of Soto and De La Cerra are AFFIRMED.

APPENDIX "B"

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1644
DC No. CR 82-139-4-ACM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

BERNARDO ARMANDO DE LA CERRA,

Defendant-Appellant.

O R D E R

Before: WALLACE, TANG and NELSON,
Circuit Judges.

[Filed Oct. 27, 1983]

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote

on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.